No. 11034

In the United States Circuit Court of Appeals for the Ninth Circuit

A. N. McDONALD, APPELLANT

v.

CHESTER BOWLES, ADMINISTRATOR, OFFICE OF PRICE ADMINISTRATION, APPELLEE

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

APPELLEE'S BRIEF

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JURISDICTION

This is an appeal from a final judgment (R. 19) in an action brought by the Price Administrator pursuant to sections 205 (a) and 205 (e) of the Emergency Price Control Act (50 U. S. Code App. Section 925, 56 Stat. 23) for an injunction and treble damages.[1] Jurisdiction of the District Court was in-

[1] The money judgment was entered on September 5, 1944 (R. 20). The injunctive decree (R. 24–26) was entered on September 8, 1944. Appellant's notice of appeal (R. 28) specifies only the judgment entered on September 5th. Mention of the decree does appear in appellant's Statement of Points relied on and Designation (R. 93–94), and the validity of the injunction is argued by appellant on this appeal.

voked under section 205 (c) of the Act, and jurisdiction of this Court is invoked under sections 128 and 129 of the Judicial Code (28 U. S. Code, section 225, 227).

STATEMENT OF THE CASE

The complaint for injunction and treble damages was in seven counts (R. 2–13). It charged appellant with selling meats at prices in excess of the ceilings established by Revised Maximum Price Regulation No. 169, as amended—Beef and Veal Carcasses and wholesale cuts (7 Fed. Reg. 10381) (R. 2–3); Revised Maximum Price Regulation No. 239, as amended—Lamb and Mutton Carcasses, and cuts at wholesale and retail (7 Fed. Reg. 10688 (R. 3–4); Revised Maximum Price Regulation No. 148, as amended—Dressed Hogs and wholesale Pork cuts (7 Fed. Reg. 8609) (R. 4); Maximum Price Regulation No. 389, as amended—Ceiling Prices for Certain Sausage Items at wholesale (8 Fed. Reg. 5903) (R. 4–5); and Maximum Price Regulation No. 398—Variety Meats and Edible By-Products at wholesale (8 Fed. Reg. 6945) (R. 5–16), and in failing to file and keep records in accordance with the requirements of the regulations (R. 6–9). The complaint prayed for recovery of treble damages (R. 9–11) and for injunctive relief against further violations of the applicable regulations (R. 11–13). Suit was originally instituted against A. N. McDonald and W. O. Finke, individually and as copartners (R. 2). By Pre-Trial Order (R. 15) the action against W. O. Finke was dismissed upon the ground that he was an employee of McDonald, and not his

partner. The appellant's answer conceded jurisdiction, denied all other allegations of the complaint, and pleaded failure to state a claim (R. 14).

At the trial, appellee produced Ollis W. Newman, an investigator in the Office of Price Administration (R. 34), who testified that he had examined the sales records of the appellant for the month of June 1943 (R. 34); that he had transcribed these records (R. 35); that the transcription [2] was made under his direction (R. 35); some of it was in his handwriting (R. 35); and that he had checked the ceiling prices that appeared on the transcript (R. 35). He testified further that in computing ceiling prices, he had taken into consideration the grade (R. 55); and that he had followed out a large part of the invoices to destination (R. 57). Albert L. Learney testified that he was a Price Specialist in the Office of Price Administration (R. 39); that he specialized in the regulations governing the sales of meat (R. 39); that he had examined the transcript (Plaintiff's Exhibit 1), checked the ceiling prices stated there against the applicable regulations (R. 42), and that he found no errors (R. 43).

Appellant offered only one witness at the trial, Mary E. McDonald, appellant's wife (R. 66).[3] She testified that during her husband's absence from the business, she was in charge (R. 66), and worked there

[2] Plaintiff's Exhibit 1, covering the month of June 1943, contained approximately 1,500 different items of overcharges. The total overcharges amounted to $4,134.70.

[3] No explanation was offered for the failure to call Finke, the bookkeeper, or other employees. Appellant did not testify.

(R. 68). Her husband had not instructed her to sell meat at other than ceiling prices; he told her "to try to follow the bills or the pamphlets or whatever it was that came out from the OPA, or from the Butchers Union, whatever they were" (R. 69). He told her to follow "a pamphlet that came" as "closely as I could and do the best I could, * * *" (R. 69). She was not a butcher by trade, and had no knowledge of grading meat (R. 69). Although she carried on the bookkeeping and billing end of the business, she did not remember ever checking for grade under the regulations (R. 72). The business supplied shipyard restaurants, schools, hotels, and colleges (R. 72). She was not adding anything on to the prices "except what you are allowed for delivery and for overhead charges and things like that," just "the ordinary margin of profit" (R. 73). She never inquired at the Office of Price Administration concerning proper prices; "when Mr. McDonald came back he had me go over and look over things" (R. 73). She followed a list that Mr. Finke told her to follow "so many times at so much, whatever it was" (R. 74), but "Mr. Finke was not any too well, himself; he was working hard, and he said he was not taking any responsibility" (R. 74).

The jury returned a verdict in the sum of $4,634.07 (R. 92). Judgment was entered thereon September 5, 1944 (R. 19). Findings of fact and conclusions of law were filed September 8, 1944 (R. 21–23), and the injunctive decree entered September 8, 1944 (R. 24–26). Notice of appeal was filed December 15, 1944 (R. 28).

ARGUMENT

I

The verdict of the jury, based upon competent and overwhelming proof of liability and upon appropriate instructions by the District Court, should not be disturbed. The injunctive decree was properly issued.

A. The argument concerning the pre-trial order

The appellant contends that the pre-trial order (R. 15–17) was improvidently granted, and, in addition, deprived him of guaranteed constitutional privileges. Appellant apparently does not object to the first part of the order (R. 15) which dismissed the action against Finke, nor did appellant in his exception to the order state any constitutional objection (R. 17).

1. In any event, appellant errs as to the scope of Rule 16 of the Federal Rules of Civil Procedure (28 U. S. Code following Section 723 c) governing pre-trial procedure. Among the elements appropriate for consideration at a pre-trial conference under Rule 16 are: "(1) The simplification of the issues; * * * ; (6) Such other matters as may aid in the disposition of the action." The Courts have indicated ample disposition to utilize pre-trial procedure for the simplification of the issues. Cyclopedia of Federal Procedure (2nd ed.) Vol. 5, section 1993. "If justice is to be speedy, efficient and inexpensive, justice requires that a party be relieved of the necessity of elaborate preparation upon non-existent issues. Merely because the law places the burden of proof upon one party with respect to a certain issue is no reason for concluding that the other party cannot be asked

whether he seriously intends to raise that issue." *LaCanin* v. *Automobile Ins. Co. of Hartford,* 41 F. Supp. 1021, 1022 (D. C. E. D. N. Y., 1941). See, *Yale Transport Corp.* v. *Yellow Truck & Coach Mfg. Co.,* 3 F. R. D. 440 (D. C. S. D. N. Y., 1944). The pre-trial conference may be termed a "dress rehearsal" of the final trial. Clearly, under such circumstances, an order is not improvidently granted if it directs the plaintiff to furnish to defendant competent documentary evidence in the form of a compilation of defendant's own records; then requests defendant, in effect, to discredit or impeach any item contained in the document ("specifications of objection") as he would at a trial, in which event the issues joined would be submitted to the jury; and then directs that those items which are undisputed and not in issue shall be deemed true and accurate. These are procedures common to every trial, civil or criminal.

Moreover, *appellee did not rely on the pre-trial order; he produced all his evidence at the trial. The only effect of the pre-trial order, therefore, was to make Plaintiff's Exhibit 1 available to the defendant for a period of more than four months before the trial.*

2. It is quite true that no man may be compelled to be a witness against himself, but "sometimes in the progress of a trial the burden of going forward with the evidence may require the accused to produce testimony for himself or suffer an inference of guilt from facts already proven to be drawn against him by the jury" *Bradford* v. *U. S.,* 130 F. (2d) 630 (C. C. A. 5th, 1942) 129 F. (2d) 274, 278, cert. den. 317 U. S. 683. There was nothing in the pre-

trial order therefore which compelled appellant to testify against himself (and, indeed, he did not). There was no testimonial compulsion of any kind. The only burden placed upon him was to cross-examine, impeach, discredit or in any manner impair the documentary evidence offered by plaintiff at the pretrial conference. There was no compulsion upon him to admit that the evidence was true. He could have objected to and denied each item in the compilation. As a matter of fact, there was never at any stage of the proceeding any compulsion upon the appellant to testify. He had available the testimony of his wife, Finke, bookkeeper—and the records themselves to refute Plaintiff's Exhibit 1. Appellant chose not to avail himself of these salutary procedures. He cannot be heard to say that by his own inaction he can deprive appellee of the rule of evidence which operates in any civil or criminal trial—that uncontradicted testimony, not incredible in itself, nor impeached nor discredited in any way, to plain and simple facts capable of contradiction, ordinarily must be accepted as true by the trier of the facts. *Alabama Title & Trust Co.* v. *Millsap,* 71 F. (2d) 518, 520 (C. C. A. 5th, 1934). Appellant may be free from the compulsion to testify; he is not free from the inference which the testimony compels.[4]

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[4] Appellant points to *Boyd* v. *U. S.*, 116 U. S. 616. There a statute was held unconstitutional which provided that if a defendant failed to produce his private papers after notice from the United States to produce, then the allegations made by the United States concerning such papers should be taken as confessed. Thus, whatever the District Attorney said about the papers, no matter how baseless, would be taken as true. *Boyd* v. *U. S.*, however, has

Thus, it is universally accepted that legislative presumptions of fact thrusting the burden of explanation upon the accused, do not violate the constitutional clause protecting against "self-incrimination". *Casey* v. *U. S.*, 276 U. S. 413, 418; *Yee Hem* v. *U. S.*, 268 U. S. 178, 183; *Luria* v. *U. S.*, 231 U. S. 9; *Mobile, Jackson & Kansas City R. R. Co.* v. *Turnipseed*, 219 U. S. 35; *Cases* v. *U. S.*, 131 F. (2d) 916, 923 (C. C. A. 1st, 1942) cert. den. 319 U. S. 770; *Toy* v. *U. S.*, 266 Fed. 326, 329 (C. C. A. 2d, 1920) cert. den. 254 U. S. 639; *Gee Woe* v. *U. S.*, 250 Fed. 428, 429 (C. C. A. 5th, 1918) cert. den. 248 U. S. 562; *Rosenberg* v. *U. S.*, 13 F. (2) 369, 370 (C. C. A. 9th, 1926). And while an accused's failure to take the stand may not be construed against him, the Court may instruct the jury that such failure to testify did not impair the effect of uncontradicted facts. *Lefkowitz* v. *U. S.*, 273 Fed. 664, 667 (C. C. A. 2d, 1921) cert. den. 257 U. S. 637; *Jenkins* v. *U. S.*, 58 F. (2d) 556 (C. C. A. 4th, 1932) cert. den. 287 U. S. 622; *Jamail* v. *U. S.*, 55 F. (2d) 216, 217 (C. C. A. 5th, 1932); *Robilio* v. *U. S.*, 291 Fed. 975, 985 (C. C. A. 6th, 1923) cert. den. 263 U. S. 716; *Michael* v. *U. S.*, 7 F. (2d) 865, 866 (C. C. A. 7th, 1925); *Morrison* v. *U. S.*, 6 F. (2d) 809, 810 (C. C. A. 8th, 1925); *Sidebotham* v. *U. S.*, 253 Fed. 417, 421 (C. C. A. 9th, 1918); and even in criminal cases, the rule is that if "a party has it peculiarly within his

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nothing to do with the well-settled rule of law that where a defendant voluntarily chooses to abstain from impeaching the testimony of the plaintiff, or to make any explanation in reference thereto; the effect is to concede that there is no issue. See, *Friedman* v. *U. S.*, 276 Fed. 792, 794 (C. C. A. 2d, 1921); *Grunberg* v. *U. S.*, 145 Fed. 81, 87 (C. C. A. 1st, 1906).

power to produce witnesses whose testimony would elucidate the transaction, the fact that he does not do it creates the presumption that the testimony, if produced, would be unfavorable." *Interstate Circuit* v. *U. S.,* 306 U. S. 208, 225; *Scala* v. *U. S.,* 54 F. (2d) 608, 610 (C. C. A. 7th, 1931) cert. den. 285 U. S. 554; *U. S.* v. *Fox,* 97 F. (2d) 913, 915 (C. C. A. 2d, 1938); *Donegan* v. *U. S.,* 296 Red. 843, 849 (C. C. A. 5th, 1924), cert. den. 265 U. S. 585.

3. Since the pre-trial order did not compel the appellant to testify within the constitutional intendment, discussion of the nature of the Price Administrator's suit for treble damages is without moment. See U. S. ex rel. *Bilokumsky* v. *Tod,* 263 U. S. 149, 155; *Speten* v. *Bowles,* 146 F. (2d) 602, 604 (C. C. A. 8th, 1945) cert. den. 65 S. Ct., 1023.[5]

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[5] Regardless of the validity of the Court's discussion of the nature of the action, *Bowles* v. *Trowbridge*, 60 F. Supp. 48 (D. C. N. D. Calif., S. D., 1945) does not aid the appellant. In that case the issue involved answers under oath through interrogatories. It is questionable that interrogatories constitute "a direct attempt to compel defendant to testify" (*supra*, 49), "* * * because the answers do not become evidence in the case unless voluntarily introduced by the interrogator * * *" *Coca Cola Co.* v. *Dixi-Cola* Laboratories, 30 F. Supp. 275, 279 (D. C. D. Md., 1939); and, in any event the sweeping objections to the interrogations should not have been sustained for "it is for the tribunal conducting the trial to determine what weight should be given to the contention of the witness that the answer sought will incriminate him" *U. S. ex rel. Vatjauer* v. *Commissioner of Immigration*, 273 U. S. 103, 113. Indeed, interrogatories concerning records required to be kept by defendant under the Price Control Act would have been clearly permissible. *U. S.* v. *Austin-Bagley Corp'n.*, 31 F. (2d) 229, 234, (C. C. A. 2d, 1929), cert. den., 279 U. S. 863; *Fishman* v. *Marcouse*, 32 F. Supp. 460 (D. C. E. D. Pa., 1940).

The appellant also objects to the pre-trial orde as constituting pre-judgment because it refers to "pr er ceiling price" (Br. 14). But as to that appellant n- ceded that the Court may take judicial notice R. 35, 36), and in any event appellant was not har d because they were amply established at the trial.

B. The argument concerning Appellee's Exhibit 1

Appellee's Exhibit 1 was admissible in evide e *Augustine* v. *Bowles,* 149 F. (2d) 93 (C. C. A. 9 , 1945); *United States* v. *Deardorff,* 40 F. Supp. 5 , 515 (D. C. M. D. Pa., 1941); Wigmore, Evidence (d ed.) Vol. IV, Section 1230. Since the production f the original documents was not required, and sin the exhibit was available for appellant's inspecti for more than four months, notice to produce was u necessary *Stephens* v. *United States,* 41 F. (2d) 44 444 (C. C. A. 9th, 1930), cert. den. 282 U. S. 8 Appellant's arguments concerning the making of t original invoices, proof of payment or delivery (S Section 4 (a) of the Act prohibiting offers to sell mis-billing, and other related contentions are witho merit. The appellant never questioned the validity o the document, nor did he endeavor to impeach i That he had ample opportunity is clear from th record (R. 38, 63, 64, 65).

> The COURT. You have had an opportunit to go into this matter before the trial and yo still have an opportunity to examine the OPA witness to find out whether there is any ques- tion about any of these matters.

Mr. Reagh. I would rather not. It is a technical proposition.

The Court. You simply want to take the position that you do not want to look into those matters?

Mr. Reagh. That is exactly right (R. 64, 65).

Apellee's Exhibit 1, properly in evidence, was prima facie true, accurate and correct as to the facts therin set forth. Uncontradicted and unimpeached, the jury was justified in accepting these facts as established, and in drawing all reasonable inferences from them. *Straus* v. *Victor Talking Machine Co.*, 297 Fed. 791 804 (C. C. A. 2nd, 1924); *Consolidated Gas Co. of New York* v. *Newton*, 267 Fed. 231, 242 (D. C. S. D. N. Y., 1920) affirmed 258 U. S. 165, 176; *Bingham Mies Co.* v. *Bianco*, 276 Fed. 513, 519 (C. C. A. 8th, 192); *Walling* v. *Peavy-Wilson Lumber Co.*, 49 F. Sup. 846, 872 (D. C. W. D. La., 1943).

C. The argument concerning the instructions of the Court

The defendant was not entitled to an instruction concerning presumption of innocence or fair dealing. *Lienthal* v. *United States*, 97 U. S. 237, 265–267; *Hivering* v. *Mitchell*, 303 U. S. 391, 403. His criticism of the Court's charge concerning appellant's duties under the circumstances of the case is without merit. The appellant was under a duty to inform himself of all applicable price regulations and was legally chargeable with notice of their provisions. *Bowles* v. *80 Seventh Ave. Corp.*, 150 F. (2d) 819 C. C. A. 2nd, 145); *Bowles* v. *Ohse*, 4 F. R. D. 402, 404 (D. C. N. D.

Neb., 1945). Wilfulness in violation is not a necessary ingredient in a treble damage suit. *Bowles* v. *Indianapolis Glove Co.,* 150 F. (2d) 597 (C. C. A. 7th, 1945). An owner's absence from his business will not relieve him of liability for acts committed by his agents to whom he entrusted the conduct of his business. "* * * whatever an agent does or says in reference to the business in which he is at the time employed, and within the scope of his authority, is done or said by the principal; and may be proved, as well in a criminal as a civil case, * * *." *Stockwell* v. *United States,* 13 Wall. (U. S.) 531, 550; *Bowles* v. *870 Seventh Ave. Corp.,* 150 F. (2d) 819, 823 (C. C. A. 2nd, 1945). The objection to the Court's charge on the issue of damages is equally without merit. In view of the state of the record, the Court could well have directed a verdict for the appelle. Indeed, on the issue of overcharges the jury could make no other finding in the light of the uncontradicted testimony. Therefore, the appellant was aided when the Court charged the jury that his opinion as to the amount of the overcharges was not binding upon the jury and that they could come to a different conclusion (R. 85–86).

It is doubtful that appellant's objections to the instructions of the Court are well taken (Rule 51 of the Federal Rules of Civil Procedure, 28 U. S. Code following Section 723c). In any event, since appellee was entitled to judgment and verdict in his favor un-

der the undisputed evidence, any errors in instructions were not projudicial. Rule 61 of the Federal Rules of Civil Procedure; *Horning* v. *District of Columbia,* 254 U. S. 135, 138; *Jacobs* v. *Ivins,* 250 Fed. 431 (C. C. A. 3rd, 1918); *Hamilton Iron & Steel Co.* v. *Groveland Mining Co.,* 233 Fed. 388, 393 (C. C. A. 6th, 1916); *Chicago Rys. Co.* v. *Kramer,* 234 Fed. 245, 253 (C. C. A. 7th 1916); *Morgan* v. *United States,* 98 F. (2d) 473, 477 (C. C. A. 8th, 1938), cert. den. 305 U. S. 648. And a judgment will not be reversed for an error in instruction, where the District Court should have directed a verdict. *Eastern Transportation Line* v. *Hope,* 95 U. S. 297, 302; *Weidenfeld* v. *Pacific Import Co.,* 43 F. (2d) 817, 820 (C. C. A. 2nd, 1930) cert. den. 282 U. S. 890; *Aetna Insurance Co.* v. *C. I. T. Corp,* 74 F. (2d) 517, 518 (C. C. A. 5th, 1934).

D. The argument concerning the issuance of the injunctive decree.

The jury found against the appellant on the issues of lack of wilfullness and the taking of practicable precautions. Their verdict, and the findings of the Court, were fully justified by the record. It is fair to infer from the testimony that appellant's interest in the price regulations had never been great; it was only quickened after the investigators examined his records (R. 40, 73). Overcharges on approximately 1500 items within a period of one month do not indicate inadvertence or innocent mistake. There was no abuse of discretion in the action of the District Court *Bowles* v. *Montgomery Ward & Co.,* 143 F. 2d 38

(C. C. A. 7th, 1944); *Bowles* v. *870 Seventh Ave. Corp.*, 150 F. (2d) 819 (C. C. A. 2d, 1945).

CONCLUSION

The money judgment and the injunctive decree were fully warranted by the undisputed evidence and should be affirmed.

Respectfully submitted.

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